APPENDIX.

An Act to provide for the regulation of public utilities, passed by the Illinois Legislature and approved June 30, 1913.

"Sec. 8. The commission shall have general supervision of all public utilities, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipments and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the commission and with the charter and franchise requirements. * * *

Sec. 9. Every public utility shall furnish to the commission all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all questions submitted by the commission. * * *

Sec. 10. The term 'public utility,' when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter:

(a) May own, control, operate or manage, within the state, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this state; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger; or that

(b) May own or control any franchise, license, permit or right to engage in any such business.

* * *

Sec. 11. The commission shall have power to establish a uniform system of accounts to be kept by public utilities or to classify public utilities and to establish a uniform system of accounts for each class, and to prescribe the manner in which such accounts shall be kept. It may also, in its discretion, prescribe the forms of accounts to be kept by public utilities, including records of service, as well as accounts of earnings and expenses, and any other forms, records and memoranda which in the judgment of the commission may be necessary to carry out any of the provisions of this Act. * * *

Where the commission has prescribed the forms of accounts to be kept by any public utility for any of its business, it shall thereafter be unlawful for such public utility to keep any accounts for such business other than those prescribed or approved by the commission, or those prescribed by or under the authority of any other state or of the United States. * * *

Sec. 16. Each public utility shall have an office in one of the cities, villages or incorporated towns in this state in which its property or some part thereof is located, and shall keep in said office all such books, accounts, papers, records and memoranda as shall be ordered by

the commission to be kept within the state. The address of such office shall be filed with the commission. No books, accounts, papers, records, or memoranda ordered by the commission to be kept within the state shall be at any time removed from the state, except upon such conditions as may be prescribed by the commission.

Sec. 19. Each public utility in the state shall each year after the year 1913, furnish to the commission, in such form as the commission shall require, annual reports as to all the items mentioned in the preceding sections of this article, and in addition such other items, whether of a nature similar to those therein enumerated or otherwise, as the commission may prescribe. * * *

Sec. 33. Every public utility shall file with the commission and shall print and keep open to public inspection schedules showing all rates and other charges, and classifications, which are in force at the time for any product or commodity furnished or to be furnished by it, or for any service performed by it, or for any service in connection therewith, or performed by any public utility controlled or operated by it. * * *

Every public utility shall file with the commission copies of all contracts, agreements or arrangements with other public utilities, in relation to any service, product or commodity affected by the provisions of this Act, to which it may be a party, and copies of all other contracts, agreements or arrangements with any other person or corporation affecting in the judgment of the commission the cost to such public utility of any service, product or commodity.

Sec. 36. Unless the commission otherwise orders, no change shall be made by any public utility in any rate or other charge or classification, or in any rule, regulation, practice or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public as herein provided.

Such notice shall be given by filing with the commission and keeping open for public inspection new schedules or supplements stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the 30 days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or other charge, or classification, or in any rule, regulation, practice, or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, such proposed changes shall be plainly indicated on the new schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item.

No public utility shall increase any rate or other charge, or so alter any classification, contract, practice, rule or regulation as to result in any increase in any rate or other charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified.

Whenever there shall be filed with the commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the commission shall have power, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation, and pending the hearing and the decision thereon, such rate or other charge, classification, contract, practice, rule or

regulation shall not go into effect: *Provided,* that the period of suspension of such rate or other charge, classification, contract, practice, rule or regulation shall not extend more than 120 days beyond the time when such rate or other charge, classification, contract, practice, rule or regulation would otherwise go into effect unless the commission, in its discretion, extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof which it shall find to be just and reasonable. All such rates or other charges, classifications, contracts, practices, rules or regulations not so suspended shall, on the expiration of thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant, go into effect and be the established and effective rates or other charges, classifications, contracts, practices, rules and regulations, subject to the power of the commission, after a hearing had on its own motion or upon complaint, as herein provided, to alter or modify the same. * * *

Sec. 41. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts, or practices, or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates or other charges, or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates or other charges, classifica-

tions, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. * * *

Sec. 49. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and shall fix the same by its order, decision, rule or regulation. The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.

Sec. 50. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employes or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes to be made or such structure or structures be erected in the manner and within the time specified in said order. * * *

Sec. 54. The commission shall have power to ascertain, determine and fix for each kind of public utility suitable and convenient standard

commercial units of service, product or commodity, which units shall be lawful units for the purposes of this Act; to ascertain, determine and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the performing of its service or to the furnishing of its product or commodity by any public utility, and to prescribe reasonable regulations for examining, measuring and testing such service, product or commodity, and to establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for examining, measuring, or testing such service, product or commodity. The commission may purchase such materials, apparatus and standard measuring instruments as it deems necessary to carry out the provisions of this section. * * *

Sec. 57. The commission shall have power, after a hearing and upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employes, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employes, passengers, customers or the public may demand. * * *

Sec. 64. Complaint may be made by the commission, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any

body politic or municipal corporation by petition or complaint in writing, setting forth any act or thing done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the commission. * * *

Sec. 68. Within thirty days after the service of any order or decision of the commission made after a final hearing, or within thirty days after a hearing or refusal of a hearing upon any rule, regulation, order or decision which the commission is authorized to issue without a hearing and has so issued, any person or corporation affected by such rule, regulation, order or decision may appeal to the Circuit Court of Sangamon County, for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined: *Provided*, that no proceeding to contest any rule, regulation, decision or order which the commission is authorized to issue without a hearing and has so issued, shall be brought in any court unless application shall have been first made to the commission for a hearing thereon and until after such application has been acted upon by the commission, nor shall any person or corporation in any court urge or rely upon any grounds not set forth in such application for a hearing before the commission: *And, provided*, the commission shall decide the questions presented by said application with all possible expedition consistent with the duties of the commission. The party taking such an appeal shall file with the secretary of the commission, at its office in Springfield, Illinois, written notice of said appeal. The commission, upon the filing of such notice of appeal, shall, within five days thereafter, file with the clerk of said Circuit Court of Sangamon County a certified copy of the order appealed from and within ten days thereafter the record provided for in Section 64. * * *

Sec. 75. Whenever the commission shall be

of the opinion that any public utility is failing or omitting or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, regulation, direction or requirement of the commission, issued or made under authority of this Act, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order, decision, rule, regulation, direction or requirement of the commission, issued or made under authority of this Act, it shall direct the counsel for the commission to commence an action or proceeding in the Circuit Court, or in any other court of concurrent jurisdiction, in and for the county in which the case or some part thereof arose, or in which the person or corporations complained of, if any, has its principal place of business, or in which the person complained of, if any, resides, in the name of the people of the State of Illinois, for the purpose of having such violations or threatened violations stopped and prevented, either by *mandamus* or injunction. Counsel for the commission shall thereupon begin such action or proceeding by petition to such Circuit Court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of *mandamus* or injuncton. * * *

Sec. 76. Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this Act, or which fails to obey, observe or comply with any order, decision, rule, regulation, direction or requirement or any part or provision thereof, of the commission, made or issued under authority of this Act, in a case in which a penalty is not otherwise provided for in this Act, upon conviction, shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars for each and every offense. * * *

Sec. 77. Every person, who, either individ-

ually, or acting as an officer, agent or employe of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to obey, observe or comply with this Act or any such order, decision, rule, regulation, direction or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

NO. 1006

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

ALBERT S. BURLESON, Postmaster General, (*Plaintiff*), *Appellant.*

vs.

THOMAS E. DEMPCY, WALTER A. SHAW, PATRICK J. LUCEY, JAMES H. WILKERSON, and FRANK H. FUNK, constituting the Members of the Public Utilities Commission of Illinois, the Public Utilities Commission of Illinois, EDWARD J. BRUNDAGE, Attorney General of the State of Illinois, (*Defendants*), *Appellees.*

Appeal from the United States District Court of Illinois, for the Northern District of Illinois.

Honorable
K. M. Landis,
Judge Presiding.

BRIEF

on behalf of Thomas E. Dempcy, Walter A. Shaw, Patrick J. Lucey, James H. Wilkerson and Frank H. Funk, constituting the Members of the Public Utilities Commission of Illinois, the Public Utilities Commission of Illinois, Edward J. Brundage, Attorney General of the State of Illinois, appellees, on appeal from the final decree dismissing complainant's bill of complaint and enjoining complainant in accordance with the prayer of appellees' answer.

EDWARD J. BRUNDAGE,
Attorney General,
ATTORNEY FOR APPELLEES.

GEORGE T. BUCKINGHAM,
MATTHEW MILLS,
RAYMOND S. PRUITT,
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Of Counsel.

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TABLE OF CASES.

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on behalf of Thomas E. Dempcy, Walter A. Shaw, Patrick J. Lucey, James H. Wilkerson and Frank H. Funk, constituting the Members of the Public Utilities Commission of Illinois, the Public Utilities Commission of Illinois, Edward J. Brundage, Attorney General of the State of Illinois, appellees, on appeal from the final decree dismissing complainant's bill of complaint and enjoining complainant in accordance with the prayer of appellees' answer.

STATEMENT.

This appeal is from a final decree entered April 26, 1919, dismissing the plaintiff's bill of complaint for want of equity, and permanently enjoining and restraining the Postmaster General and each of his agents, deputies and employees, from charging, demanding, collecting or receiving, for the transmission of messages by telegraph between points lying

wholly within the State of Illinois, any rates other or different from the rates and tariffs applicable to the transmission of such messages as specified in the schedules filed with the Public Utilities Commission of Illinois and in force prior to the 29th day of March, 1919, and from charging, demanding, collecting or receiving, for the transmission of messages between points lying wholly within the State of Illinois, the increased rates therefor as authorized and ordered by the Postmaster General of the United States until such increased rates and charges shall be approved by the Public Utilities Commission of Illinois, said injunction being granted in accordance with the prayer of defendants' answer filed in said cause, praying for affirmative relief against the plaintiff.

This proceeding requires an interpretation of a resolution of the Congress of the United States adopted July 16, 1918, hereinafter referred to as the "Wire Resolution." Similar questions are involved in other cases now pending in this court arising out of various suits instituted by state authorities against the Postmaster General and different telephone and telegraph companies, having for their purpose, the enforcement of the provisions of the various state laws in many respects similar to the Public Utilities Act of Illinois. This case, however, differs from the other proceedings referred to in that it is the Postmaster General who, in this instance, first sought the aid and assistance of a court of equity to protect him in the exercise of the powers which he claims to possess and enjoy, and the Postmaster General by so doing, waived all question

as to the jurisdiction of the court to define and limit his authority, and there is, accordingly, presented here an unequivocal issue as to the proper construction of said Congressional Wire Resolution of July 16, 1918.

Circumstances Under Which This Litigation Arose.

To summarize briefly the facts out of which this litigation arose, the Congress of the United States, during the existence of an actual state of hostilities between the United States and the Imperial German Government, on July 16, 1918, adopted a joint resolution, vesting in the President certain powers to possess, operate and control all telegraph and telephone systems during the continuance of the war, said resolution being in words and figures as follows:

> "Joint resolution to authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide compensation therefor.
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, *whenever he shall deem it necessary* for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable or radio system or systems, or any part thereof, and to operate the same in *such manner* as may *be needful* or *desirable*, for the duration of the war, which supervision, posses-

sion, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace; *provided*, that just compensation shall be made for such supervision, possession, control or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, Paragraph 20, and Section 145 of the Judicial Code; *provided*, further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." (Italics ours.)

On July 22, 1918, the President, purporting to act pursuant to the power and authority vested in him by said resolution, issued the following proclamation:

"By the President of the United States of America.

A Proclaamtion.

Whereas, the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

That the President, during the continuance of the present war, is authorized and empowered,

whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable, for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided,* that just compensation shall be made for such supervision, possession, control or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, Paragraph 20, and Section 145 of the Judicial Code: *Provided,* further, that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transmission of Government communications or the issue of the stocks and bonds by such system or systems.

And whereas it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession

and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President, in the District of Columbia, this 22d day of July, in the year of our Lord 1918, and of the independence of the United States the 143d.

(SEAL) WOODROW WILSON.

By the President:

FRANK L. POLK,

Acting Secretary of State."

Thereafter, pursuant to said proclamation, the President did, at 12 o'clock midnight, on July 31, 1918, take possession and assume control of every telegraph and telephone system in the United States, and proceeded, from that time thenceforth, to control and operate said systems through the Postmaster General, the plaintiff, Albert S. Burleson, who has not only taken charge of the physical properties of said telephone and telegraph companies and made contracts with them for compensation for the use of the same, but has also undertaken to supervise and control the acts and doings of their various officers and employees and to issue various orders to them at different times, through a committee of three individuals designated as the "Operating Board."

Provisions of the Illinois Public Utilities Commission Law.

At the time of the passage of said Wire Resolution of July 16, 1919, and the seizure of said telegraph and telephone systems by the President, and at all times subsequent thereto, there was, and is now, in full force and effect, in the State of Illinois, a certain Act of the Legislature entitled, "An Act to provide for the regulation of Public Utilities," in force January 1, 1914, said act being hereinafter referred to as the Public Utilities Commission Law. The individual defendants herein named are the members of said Public Utilities Commission of Illinois, vested by said law with the supervision, regulation and control of all public utilities doing business in said state, and the defendant, Attorney General, is the chief law officer of the State of Illinois, charged with the duty and responsibility of enforcing said law.

The said Public Utilities Commission Law provides, *inter alia*, that, "The term public utilities, when used in this Act, means, and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever (except, however, such public utilities as are, or may hereafter be owned by any municipality) that now, or hereafter may own, control, operate or manage, within the state, directly or indirectly, for public use, any plant, equipment or property used, or to be used, for, or in connection with * * * the transmission of telegraph or telephone messages between points within this state."

Section 32 of said Act provides: "All rates and other charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered, or to be rendered, shall be just and reasonable." Sections 33 and 34 of said Act provide for the filing, publication and posting of schedules of rates to be established by public utilities prior to the date when same become effective. Section 35 of said Act provides: "No public utility shall undertake to perform any service, or to furnish any product or commodity unless, or until the rates and other charges and classifications, rules and regulations relating thereto applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act." Section 36 provides: "Unless the Commission otherwise orders, no change shall be made by any public utility in any rate or other charge or classification, or in any rule, regulation, practice or contract relating to, or affecting any rate or other charge, classification or service, or in any privilege or facility, except after thirty days' notice to the Commission and to the public as herein provided. * * * No public utility shall increase any rate or other charge, or so alter any classification, contract, practice, rule or regulation as to result in any increase in any rate or other charge under any circumstances whatsoever, except upon a showing before the Commission and a finding by the Commission that said increase is justified."

Postmaster General Operated Telegraph Companies as Public Utilities.

The said Postmaster General of the United States, prior to the said April 1, 1919, acting under the provisions of said Wire Resolution and Proclamation of the President of the United States, had made certain contracts with the telegraph companies owning and operating telegraph systems in the State of Illinois, whereby he undertook to pay said companies certain rental or compensation for their property during the period when same should be so operated by the Postmaster General, and the Postmaster General thereby became the lessee of said public utilitiy properties, and as such lessee continued to transmit messages by telegraph between various points in the State of Illinois, and by force of the express provisions of said Illinois statute, the said Postmaster General, then and there, became a public utility, subject to all rules, regulations and restrictions imposed by the police regulations of the State of Illinois upon public utilities doing business in said state.

From July 31, 1918, the date of the seizure of said telegraph systems and properties by the Postmaster General, to April 1, 1919, the said Postmaster General continued to operate the properties controlled by him as aforesaid, and to transmit messages for the public, between points lying wholly within the State of Illinois, at the same rates legally established and charged therefor prior to the period of Government control. On March 29, 1919, the said Post-

master General undertook, however, to promulgate a certain order establishing a new and increased schedule of rates applicable to the transmission of domestic commercial telegrams between all points in the United States, including points lying wholly within the State of Illinois, said order providing that said new rates, which were approximately 20 per cent. in advance of the rates theretofore legally established and existing, should become effective April 1, 1919. Prior to issuing said order, the said Postmaster General did not file a schedule of the proposed new rates with the Public Utilities Commission of Illinois or give to the said Commission thirty days' notice of the date when said changes in rates were to become effective as required by Section 36 of said Act, but proceeded to institute and put into full force and effect the said increased charges for telegraphic service between all points in the United States, including service rendered within the State of Illinois, without giving to the Commission thirty days' notice of the date when such changes became effective, and without first obtaining the consent or approval of said Commission and a finding by said Commission that such increased charges were justified as required by the Statute.

Resolution Adopted by the Public Utilities Commission.

The attention of the Commission having been called to the said order of the Postmaster General instituting increased rates for telegraphic service, and to the fact that said rates had been put into full force and effect within the State of Illinois on the

first day of April, 1919, without authority of law, the said Commission, on April 4, 1919, adopted the certain resolution attached to defendants' answer and identified as "Exhibit A," whereby the said Commission instructed the Attorney General of Illinois to take such steps as he might deem necessary and appropriate to prevent the said increase in rates for said telegraphic service between points in the State of Illinois.

The Plaintiff's Bill of Complaint.

Prior, however, to the institution of any proceedings by the Attorney General, in compliance with said order, the plaintiff, Albert S. Burleson, on April 7, 1919, filed in the District Court of the United States, for the Northern District of Illinois, his bill of complaint against the defendants in this cause, seeking a permanent injunction restraining the defendants from interfering, directly, or indirectly, by suit or other prosecution, civil or criminal or in any manner whatsoever, with the plaintiff, or any of his agents or employees, in charging and collecting for telegraphic service and leased wire service, the rates prescribed by the plaintiff's said order of March 29, 1919. At the time of the filing of said bill of complaint, the court ordered the defendants to show cause, on the 14th day of April, 1919, why a temporary injunction should not issue, and pending the expiration of said rule, temporarily restrained the said defendants as prayed in said bill.

The bill of complaint sets out the necessary jurisdictional facts, the joint resolution of Congress of

sion thirty days' notice of the date when such changes became effective, and without affording to the said Commission or the Attorney General, charged with the responsibility of enforcing the said law, any opportunity to secure relief against such threatened violations of law by the institution of injunction or mandamus proceedings. Said answer further set out the provisions of Section 75 of the Illinois Public Utilities Commission Law which authorizes the said Commission, whenever it shall be of the opinion that any public utility is failing or omitting, or about to fail or omit, to do anything required of it by law, or by any order, decision, rule or requirement of the Commission, to direct the counsel for the Commission to commence an action or court proceeding in the name of the People of the State of Illinois for the purpose of preventing such violations or threatened violations of law, and said defendants prayed that they be granted the same relief by said answer as might have been obtained by an appropriate proceeding filed by them against said Postmaster General in accordance with the said provisions of Section 75 of said Illinois Public Utilities Commission Law.

The answer further charged that said new rates promulgated by the Postmaster General were greatly in excess of the rates theretofore existing, and increased the cost of telegraphic service to the citizens of Illinois by at least twenty per cent; that said increased rates were never found by said Public Utilities Commission of Illinois to be reasonable and just, but are, on the contrary, wholly arbitrary, unauthorized and unjustified, and have no tendency

whatsoever to facilitate the transmission of Government messages, or to assist the United States Government in the prosecution of the war with Germany, but are wholly subject to the lawful and existing police regulations of the State of Illinois; that defendants have no adequate remedy at law against plaintiff by reason of the multiplicity of suits which would be necessitated if an effort were made to enforce the provisions of said law by filing suits for penalties accrued for violations thereof, and defendants accordingly prayed that the said plaintiff, the Postmaster General, and his agents, servants and employes, be, upon preliminary application, temporarily enjoined and restrained, and by the final decree of the court, permanently enjoined and restrained from charging, demanding, collecting or receiving, for the transmission of telegraphic messages between points wholly within Illinois, any rates other or different from the rates and tariffs applicable to such service as specified in the schedules filed with said Public Utilities Commission, and in force prior to the 29th day of March, 1919, and from charging, demanding, collecting or receiving, for the transmission of messages between points lying wholly within the State of Illinois, the increased rates therefor as authorized and ordered by said Postmaster General of the United States until such increased rates or charges shall be approved by the Public Utilities Commission of Illinois.

Stipulation of Facts.

Thereafter, on April 21, 1919, prior to the final hearing in said cause, and for the purpose of avoiding the necessity of introducing any proof regarding the facts concerned in said proceedings, the parties thereto filed with the court two stipulations agreeing to all of the facts well pleaded in said bill of complaint and in defendants' answer thereto.

Final Decree.

The case was argued orally before Honorable Kenesaw M. Landis, district judge, on April 21, 1919, and on April 26, 1919, a final decree was entered, dismissing plaintiff's bill for want of equity, and permanently enjoining the plaintiff and each of his agents, deputies and employes from charging, demanding, collecting or receiving, for the transmission of messages by telegraph between points lying wholly within the State of Illinois, any rates other or different from the rates and tariffs applicable to the transmission of such messages as specified in the schedules theretofore filed with the Public Utilities Commission of Illinois, and in force prior to the 29th day of March, 1919, and from charging, demanding, collecting or receiving, for the transmission of messages between points lying wholly within the State of Illinois, the increased rates therefor as authorized and ordered by said Postmaster General of the United States, until said increased rates and charges shall be approved by the Public Utilities Commission of Illinois.

From said final decree, the plaintiff was allowed an appeal to the Supreme Court of the United States, the record being filed and the case docketed on April 28, 1919, and on the following day an order was entered upon motion of the defendants, advancing said case for oral argument on May 5, 1919, in order that it might be heard with the cases arising in other states involving the same questions and issues which are raised in this proceeding.

The Real Issue.

Although many questions of varying importance have been raised in this case and in other cases now before the courts, all involve one issue of paramount importance; that is to say, the right of the Postmaster General to promulgate and change rates for intrastate service during the period of Government control. It is claimed by the plaintiff, on the one hand, that the power to operate and control telegraph systems which Congress granted and conferred, necessarily includes the right to fix rates to be charged and collected during the period of Government control, and that Congress, by the language of the proviso, intended only to preserve to the states their necessary police powers incidental to the preservation and protection of the lives, health and safety of their citizens, and not their police powers to regulate the rates to be charged and collected by the Postmaster General for services rendered. It is claimed, on the other hand, by the defendants and by all other state authorities who have been concerned in such litigation, that whatever may have been the right of Congress, if it had so desired,

and had found it necessary as an incident to the war powers, to seize and operate public utility properties, to fix rates therefor, and to take any and all measures which might seem desirable or appropriate to marshal the resources of the country for war and bring same to a speedy conclusion, the Congress of the United States, in fact, by the said Wire Resolution, did not intend to take from the states their vested right to fix the rates to be charged, demanded, collected and received by the telegraph companies, but in express terms, reserved said rights to the several states by providing that nothing in said resolution contained should be so construed as to repeal, impair or affect the lawful police regulations of the states. All other issues raised in this case and in the other cases referred to, arise out of this one question, and are subordinate to it, and as we conceive that the Postmaster General, by submitting his rights and authority to a court of equity for protection, has submitted himself to the jurisdiction of the court and waived all jurisdictional questions, we shall confine our brief and argument largely to the meritorious question presented upon the record, and give only a secondary consideration to the collateral questions involved.

BRIEF.

A.

The Appeal of Albert S. Burleson, Postmaster General, From the Decree of the District Court was Properly Taken to the United States Supreme Court.

Section 238 (5) of the Judicial Code authorizes such appeals in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

The plaintiff, in his original bill of complaint (page 13), sets out the specific claim that if the Public Utilities Commision Law of Illinois be construed, as claimed by the defendants in this case, to require the Postmaster General to comply with said state statute and prescribe only such rates for intrastate service as said Utilities Commission shall approve, said state statute violates those provisions of the Constitution of the United States which confer on the Congress and President of the United States exclusive powers to declare and conduct war, and make all necessary and proper laws for carrying into execution said powers.

The decree of the District Court, dismissing plaintiff's bill for want of equity and granting an injunction to the defendants which, in effect, requires the Postmaser General to comply with said state statute and prescribe only such rates for intrastate tele-

graph service as the State Commission shall approve, is an express denial of plaintiff's asserted claim that the Illinois statute contravenes the Constitution of the United States, and the appeal was therefore properly taken and allowed to this court in accordance with Section 238 of the Judicial Code.

B.

A Court of Equity Has Jurisdiction Over the Plaintiff in This Proceeding, and May by Its Injunction Restrain Such Plaintiff From an Illegal or Unauthorized Act, Notwithstanding the Fact That He Claims to Act as Agent or Officer of the United States Government.

I. THE COURTS MAY RESTRAIN ANY OFFICER, FEDERAL OR STATE, INCLUDING MEMBERS OF THE PRESIDENT'S CABINET, FROM AN ILLEGAL USE OF THEIR AUTHORITY AS AGENTS OF THE UNITED STATES GOVERNMENT.

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 109, 110.

Philadelphia Co. v. *Stimson*, 223 U. S. 605, 619, 620.

Noble v. *Union River Logging R. R.*, 147 U. S. 165, 171, 172.

2 High on Injunctions, 4th Ed., 1322.

1 Joyce on Injunctions, 1909 Ed., Sec. 54.

State v. *Dakota Central Telephone Co.*, 171 N. W. (advance sheets) 277, 279.

a. Where the suit rests upon a charge of abuse of power by the Federal officer, he cannot claim immunity from injunction process.

Philadelphia Co. v. *Stimson, supra*, at p. 620.

(1) The courts have jurisdiction to determine whether the acts of a cabinet officer are within the powers conferred upon him by Congress, and will enjoin an illegal act in excess of his official authority.

St. Louis Independent Packing Co. v. *Houston,* 242 Fed. 337, 343.

Lewis Pub. Co. v. *Wyman,* 152 Fed. 787, 791.

(2) If the Federal officer is without power to do the *ultra vires* act, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.

Noble v. *Union River Logging Co.,* 147 U. S. 165, 171-2.

Garfield v. *Goldsy,* 211 U. S. 249, 261.

b. Such suit will not abate, because the act and possession of plaintiff is claimed to be the act and possession of the United States, and the suit is in effect a suit against the United States.

United States v. *Lee,* 106 U. S. 196, 204-219.

Osborn v. *Bank of United States,* 9 Wheat. 738, 842.

c. Such suit will not abate because the effect of the court's order may be to deprive the plaintiff of property claimed by the United States.

United States v. *Lee, supra.*

State of Georgia v. *Atkins, Collector,* 35 Ga. 315, 316-318.

d. The claim that plaintiff acts under authority

of the President of the United States does not confer immunity from suit, but the courts retain jurisdiction to inquire judicially into the question as to whether the authority set up actually exists.

United States v. *Lee, supra,* pages 219-221.
Griffin v. *Wilcox,* 21 Ind. 370, 386.

e. The order of the President of the United States, even in time of war, cannot legalize an act, which without such order would be a trespass.

Little v. *Barreme,* 6 U. S. 170, 179.
Eifort v. *Bevins,* 64 Ky. 460, 461.

f. Suits against state officers are not suits against the states, and a court of equity may restrain a state officer from executing an unconstitutional statute, as well as from an abuse of his authority under a valid law.

Ex parte Young, 209 U. S. 123, 150, 155.
Greene v. *Louis & Interurban R. R. Co.,* 244 U. S. 499, 506-507.
Reagan v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 390.
Truax v. *Raich,* 239 U. S. 33, 37.

g. Even the governor of a state may be enjoined from executing a void or unconstitutional law.

Davis v. *Gray,* 83 U. S. 203.

h. It is not by the officer to whom the writ is directed, but the nature of the thing to be done that the propriety of judicial interference is to be determined.

Marbury v. *Madison,* 5 U. S. (1 Cranch) 137, 166-171.

II. THE POSTMASTER GENERAL IS THE MOVING PARTY IN THIS LITIGATION, AND BY APPLYING TO THE DISTRICT COURT FOR A CONSTRUCTION OF HIS POWERS AND THE POWERS OF DEFENDANTS OVER INTRASTATE TELEGRAPH RATES, HE SUBMITTED HIMSELF TO THE JURISDICTION AND PROTECTION OF THE COURT, AND WAIVED HIS ASSERTED IMMUNITY FROM SUIT.

a. It is a fundamental rule of equity, that he who seeks equity, must offer equity, and do equity.

Peoples National Bank v. *Marye,* 191 U. S. 272, 283.

16 Cyc. 140.

Bispham's Principles of Equity, 1915 Ed., page 73.

b. This maxim applies to the United States as well as to individuals, and it has been repeatedly held that where the United States voluntarily submits itself to the jurisdiction of a court by instituting a civil action therein, it may be subjected to equitable proceedings of a summary character with reference to the subject-matter of such suit.

39 Cyc. 776.

United States v. *American Surety Co. of N. Y.,* 110 Fed. 913, 914.

The Siren, 74 U. S. (7 Wall) 152, 154.

United States v. *Ringgold,* 33 U. S. (8 Peters) 150, 163.

c. Upon the same principle, it follows that in this proceeding, the court may determine and define the extent of the Postmaster General's powers under the Wire Resolution, without reference to collateral

questions involving the respective jurisdiction of State and Federal Courts, or other subordinate questions which have been raised in other cases to confuse the real issue which must here be met and decided upon its merits, and not avoided or disregarded upon jurisdictional grounds.

C.

Congress by the Express Proviso Contained in the Resolution of July 16, 1918, in Effect Specifically Ordered That the Powers Thereby Conferred Upon the President Shall Not Be Construed to Amend, Repeal, Impair or Affect the Existing Police Regulations of the States Relative to Intrastate Commerce, Including the Fixing of Reasonable Intrastate Rates to Be Charged and Collected by Telephone Companies.

I. THE FIXING OF PUBLIC UTILITY RATES IS AN EXERCISE OF POLICE POWER, AND AN ACT OF THE LEGISLATURE OR AN ORDER OF THE PUBLIC UTILITIES COMMISSION PRESCRIBING THE REASONABLE RATES TO BE CHARGED BY A PUBLIC UTILITY IS A POLICE REGULATION.

a. The Illinois Public Utilities Commission Law is a police regulation enacted by the Legislature in the exercise of its police power, and has been held constitutional by the Supreme Court of Illinois.

City of Chicago v. *O'Connell*, 278 Ill. 591, 603, 607.

b. The Illinois courts have uniformly sustained the right of the Legislature, either acting directly or through a commission, to prescribe reasonable

intrastate rates to be charged and collected by the public utilities, and have held that this right of the Legislature is *police power* which cannot be contracted away.

City of Chicago v. *O'Connell, supra,* at 607.

Rogers Park Water Co. v. *Fergus,* 178 Ill. 571.

City of Danville v. *Danville Water Co.,* 178 Ill. 299.

Freeport Water Co. v. *City of Freeport,* 186 Ill. 179.

c. Other courts, both State and Federal, agree that laws fixing reasonable intrastate rates to be charged and collected by public utilities are *police regulations.*

Munn v. *Illinois,* 94 U. S. 113, 124-125.

Woodburn v. *Public Service Com.,* Ann. cases, 1917 E. 996; 82 Ore. 114; 161 Pac. 391.

Budd v. *New York,* 143 U. S. 517, 534-537.

Arkansas Rate Cases, 187 Fed. 290. 297-300.

Home Tel. & Tel. Co. v. *Los Angeles,* 155 Fed. 554, 570, affirmed in 211 U. S. 265.

Yeatman v. *Towers,* 126 Maryland, 513; 95 Atl. 158, 159.

State ex rel Webster v. *Superior Court,* 67 Wash. 37; 120 Pac. 861; L. R. A. 1915C 287, 299.

Union Dry Goods Co. v. *Georgia Public Service Corporation,* decided March 24, 1919, United States Supreme Court, Advance Opinion, No. 6, page 116.

(1) The police powers of the states were expressly defined by the Supreme Court of the United States in 1847 in a decision which has been followed in every subsequent case to this day, and said definition expressly refers to the regulation of commerce as *police power.*

The License Cases, 46 U. S. 504, 583.

(2) The courts have expressly repudiated and rejected the *"Burleson Theory,"* that there are two distinct kinds of police power, one narrow and relative only to the public health, morals and safety, and the other sufficiently broad to include every attribute of government. The Supreme Court of the United States recognizes no such distinction, but specifically holds that the police powers of a state embrace regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, morals and safety.

C., B. & Q. Ry. Co. v. *Drainage Com.,* 200 U. S. 561, 592-593.

Lake Shore Ry. Co. v. *Ohio,* 173 U. S. 285, 296-297.

(3) Police power has been broadly defined in numerous other decisions. It is not subject to definite limitations. It embraces regulations designed to promote public convenience and general prosperity as well as the public safety and health. It is "the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." "It extends to all great public needs. It may be put forth in aid of

what is sanctioned by usage, or by strong and preponderant public opinion held to be greatly and immediately necessary to public welfare, as the regulation of commerce of public utilities."

Sligh v. *Kirkwood,* 237 U. S. 52, 59.
Barbier v. *Connolly,* 113 U. S. 27.
Hammer v. *Dagenhart,* 247 U. S. 251, 274; 62 L. Ed., 1101, 1106.
Eubank v. *Richmond,* 226 U. S. 137, 142.
Noble State Bank v. *Haskell,* 219 U. S. 104.
Words and Phrases Judicially Defined, Vol. VI, topic *Police Power.*

d. The text books and encyclopædias also state that the regulation of rates of public utilities is an exercise of the police power to regulate and restrict monopolies and public business, enjoying special privileges, and to promote the public convenience and welfare.

Bierly on Police Power, p. 123.
Freund on Police Power, Secs. 372-398.
Stimson, Popular Lawmaking, 164.
Thompson on Corporations, 2nd Ed., Vol. III, Sec. 2950.
12 Corpus Juris, page 924, Sec. 432.
10 Corpus Juris, page 52, Sec. 37.

e. The Federal Government has no general police power to enact police regulations operative within the territorial limits of a state, and it cannot take this power from the states or attempt supervision over the regulations of the states established under this power.

6 Ruling Case Law, 190.

(1) Nor can Congress under the guise of an act to regulate commerce, prescribe police regulations such as child labor laws effective in the state, and thereby supersede state police regulations of peculiar local concern.

Hammer v. *Dagenhart*, 247 U. S. 251; 62 L. Ed., 1101.

(2) For the same reasons Congress cannot under the guise of its powers to make war, supersede the lawful police regulations of the states in respect to matters, such as local intrastate rates, when same have no conceivable relation to the carrying on of war, and Congress realizing this, expressly directed by the proviso that no construction be placed upon the resolution of July 16, 1918, which would in any way alter, amend, impair or repeal existing police regulations of the states.

(3) There being no general Federal Police Power, Congress in using the expression *police regulations* necessarily referred to police regulations as they existed in the several states and as defined by state laws and decisions.

36 Cyc. 1118 (f).

II. EVERY RULE OR PRINCIPLE GOVERNING THE CONSTRUCTION OF STATUTES REQUIRES THAT THE BROADEST POSSIBLE SCOPE BE GIVEN TO THE PROVISO CONTAINED IN THE RESOLUTION OF JULY 16, 1918, AND THAT UNDER NO CIRCUMSTANCES SHALL ANY CONSTRUCTION BE ADOPTED WHICH WOULD RESTRICT OR NARROW THE RESERVED POWERS OF THE STATES.

a. The manifest intention of Congress requires a broad construction of the proviso, for—

(1) Congress, in mobilizing the national resources for war manifestly could not and did not intend to interfere with inherent police powers of the states which had no conceivable relation to the war making power.

(2) The fact that the raising of intrastate telegraph rates was not a war measure essential to the winning of the war with Germany sufficiently appears from the fact that we carried the war through to a successful conclusion some five months before the Postmaster General ever attempted to supersede the existing intrastate rates.

(3) Congress, itself, eliminated all doubt as to the intended meaning of the proviso by adding the words of exception applicable to matters affecting the transmission of government messages or the issue of stocks and bonds. Regulation of intrastate rates has no conceivable reference to the transmission of government messages or the issue of securities, and hence the power of such regulations remains in the states where it has always been held, unaffected in any way by the Wire Resolution of July 16, 1918.

b. As the manifest purpose of the proviso is to save to the states that authority which the Supreme Court calls "the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government," the object of the proviso will be defeated by adopting a narrow construction of police power, and restricting the authority of the states over local rates and charges of public utilities.

c. The Congressional Resolution of July 16, 1918, is a broad grant of power to the President. The proviso contained therein is a restriction or limitation upon the power so granted and conferred, and constitutes a legislative construction of the act which excludes all possible ground for placing upon the resolution any interpretation which would authorize the President or his agents to modify existing police regulations or powers of the states relative to taxation.

36 Cyc. 1161-1168.
32 Cyc. 743.
Black on Interpretation of Laws, 1911 Ed., p. 430, Sec. 129.
Lewis' Sutherland Statutory Construction, 1904 Ed., Vol. 2, p. 670, Sec. 351.
City of Chicago v. *Phoenix Ins. Co.*, 126 Ill. 276, 280.
In re Day, 181 Ill. 73, 79.

d. Although a proviso should in general be strictly construed, consideration must be given to the apparent congressional intent to restrain or modify the enacting clause, and the proviso should be construed together with the enacting clause with

a view to giving the proper effect to each and carrying out the intention of Congress as manifested in the entire act. In general, a proviso must be so construed as to give to the statute an effect different from that which it would have had without the proviso.

Black on Interpretation of Laws, Sec. 131.
A. & E. Ency. of Law, Vol. 26, page 681.
Quackenbush v. *United States*, 33 Court of Claims, 355; 177 U. S. 20.

e. A recognized effect and operation of a proviso is to deny or prohibit, and hence when connected with a delegation of authority, it is tantamount to a command not to exercise the authority.

State v. *Orleans Levee District Commissioners*, 109 La. 403, 434; 33 Southern 385.
Austin v. *United States*, 155 U. S. 417, 431.

f. In all cases the general intent expressed in the enacting clause will be controlled by the broad intent subsequently expressed in the proviso.

Lewis' Sutherland Statutory Construction, 1904 Ed., Vol. 2, page 671.

g. The general rule that a proviso is to be strictly construed does not apply to cases where the statute itself is subject to strict construction. In all such cases, for example: in penal statutes or statutes in derogation of common law, the statute being strictly construed, the proviso upon the same principle must be broadly construed.

26 A. & E. Ency. of Law, 2nd Ed., page 680.

(1) Among the examples of such statutes may be

cited acts which grant power to deprive persons of the ownership of property without their consent, as in *Trumpler* v. *Bomerly*, 39 Cal. 490; *Young* v. *McKenzie*, 3 Ga. 31; *Campbell* v. *Youngson*, 80 Neb. 322; or which impose restrictions upon the control, management and use of private property, as in *Omaha Savings Bank* v. *Rosewater*, 1 Neb. 723; *Gray* v. *Stewart*, 70 *Kan.* 429, 78 Pac. 852; *Nance* v. *Southern Ry. Co.*, 149 N. C. 366; or which restrain the occupation of any trade or the conduct of any business, as in *Commonwealth* v. *Beck*, 187 Mass. 15; *in re* Jacobs, 98 N. Y. 98.

(2) Upon the same principle a statute or resolution whereby special powers for the accomplishment of a particular purpose are vested in an individual must be strictly construed in order that such powers may not be exercised for any collateral purpose.

26 A. & E. Ency. of Law, 664.

(3) In the case of the congressional resolution of July 16, 1918, the undoubted intent of the proviso is to reserve power in the states which, in the absence of such proviso, might be construed as having been delegated by the enacting clause to the President. It is a familiar rule of construction in all Federal questions arising under the Constitution of the United States that all delegations of power to the Federal Government are to be strictly construed and all reservations of power to the states broadly construed, and that all powers not expressly or by necessary implication conferred upon the Federal Government are reserved in the states. Upon this rule of construction effect must be given to the clearly manifested intention of Congress to reserve to the states their lawful police regulations.

III. ALTHOUGH THE RESOLUTION OF JULY 16, 1918, WAS ADOPTED IN A TIME OF NATIONAL EMERGENCY AND PERIL IN THE EXERCISE OF THE VAST UNDEFINED POWERS OF CONGRESS UNDER THE WAR CLAUSE OF THE CONSTITUTION, THE EXTENT OF THE POWERS CONFERRED REMAINS A JUDICIAL QUESTION TO BE DECIDED BY THE COURTS OF THE LAND.

In interpreting the provisions of the somewhat analogous acts of Congress by virtue of which the railroads passed under the control of the President, the United States District Court for the Eastern District of South Carolina uses this significant language, in its opinion handed down November 30, 1918:

> "Under this statute the President could authorize the Secretary of War only to take possession of such property as he himself is authorized to take possession of under the statute. The extent of his powers and the definition of what property he was authorized to take possession of under the statute would be necessarily a judicial question. All acts done and all property taken possession of within the adjudicated extent of the powers allowed might be a ministerial question, *but as to the extent of those powers and whether the powers were given must always, under the Constitution of the United States, remain a judicial question and one to be decided by the courts of the land.*"
>
> *United States Railroad Administration* v. *Burch*, 254 Fed. 140, 142.

IV. ASSUMING THAT CONGRESS, AS A WAR MEASURE, MIGHT HAVE ENACTED APPROPRIATE LEGISLATION, WIPING OUT OF EXISTENCE FOR THE PERIOD OF THE WAR, ALL STATE CONTROL OVER INTRASTATE RATES, THE POWER TO FIX RATES WHICH IS LEGISLATIVE IN ITS NATURE, COULD NOT HAVE BEEN LEGALLY CONFERRED UPON THE PRESIDENT OR ANY EXECUTIVE OFFICER.

Milwaukee Electric R. & L. Co. v. *Railroad Commission,* 238 U. S. 174, 180.

Field v. *Clark,* 143 U. S. 649, 692.

Therefore, even if the Wire Resolution was intended by Congress to confer authority upon the President to regulate intrastate rates, it did not accomplish such purpose in a constitutional manner and hence did not accomplish it at all.

ARGUMENT.

In this proceeding, both the plaintiff and defendants have sought equitable relief to protect them in the exercise of powers and authority which they claim to possess under existing Federal and State Laws. There can, therefore, be no question as to the jurisdiction of the court over the parties hereto, and the issue is narrowed to an interpretation of the powers of the President under the Wire Resolution of July 16, 1918.

THE AUTHORITY OF PLAINTIFF AND DEFENDANTS TO MAINTAIN THIS PROCEEDING IS NOT OPEN TO QUESTION.

Defendants do not question the right and authority of the Postmaster General to commence this action in equity against state officials and to secure an injunction, if his interpretation of the extent of his authority is correct, restraining their interference with powers which he claims to enjoy and exercise under the Constitution and laws of the United States. We assume, on the other hand, that the plaintiff will not seriously contend that defendants are without power and authority to maintain a counterclaim against the Postmaster General, and to secure an injunction restraining him from illegal and unauthorized acts, if, as defendants claim, the Congress did not confer, and never intended to confer, upon the President the power and authority to supersede lawful state rates established for intrastate telegraph service.

The issue therefore is clear, and goes directly to the merits of this controversy, and this court must determine whether Congress, by its resolution, intended to wipe out and supersede the reserved powers of the states to establish reasonable intrastate rates for telegraph service, or leave those powers unchanged and unhampered except in so far as they affect the transmission of Government messages or the issue of stocks and bonds by the corporate owners of telegraph properties.

THE QUESTION IS NOT AS TO WHAT ARE THE WAR POWERS OF CONGRESS, BUT AS TO WHAT POWERS CONGRESS ACTUALLY DID CONFER UPON THE PRESIDENT BY THE WIRE RESOLUTION OF JULY 16, 1918.

In this connection we recognize the claim that the war powers of Congress are vast and practically unrestricted. They are the highest expression of the sovereign power and include all that may be necessary to protect the life and existence of the nation. The powers of Congress under the war clauses of the Constitution are in fact so vast and unlimited that no court has undertaken to restrict or define them, and in so far as we are advised, no case has ever been decided in which any court has undertaken to say what Congress may do or may not do by virtue of its power to make war. We readily concede that Congress by virtue of this power and as a war necessity might have seized the telegraph and telephone lines of the country and devoted them exclusively to Government business and have done anything and all things necessary to expedite and

assist in the work of carrying on the war and bringing it to a successful conclusion. If Congress had undertaken to exercise all of its vast powers in the premises it could have possibly regulated rates, both intrastate and interstate, in so far as rate regulation might have appeared necessary or advisable, either for the purpose of raising additional revenues or reducing (to a minimum) unessential use of the properties. We concede that if Congress had acted under such circumstances, exercising all of the authority which it might have used, without provisos, or exceptions, or limitations, and expressly superseding as a war emergency all intrastate rates, no state could be heard to complain that its laws were violated or its police regulations set aside and held for naught.

In the present case we are concerned, however, not with any question as to what powers Congress might have exercised or what things Congress might have done, but as to what power and authority Congress actually did confer upon the President by the joint resolution of July 16, 1918, and as to what powers the Postmaster General acquired by virtue of the Presidential proclamation of July 22, 1918. Counsel for plaintiff will doubtless agree that the plaintiff in this cause must trace all of the power and authority which he exercises in connection with the Government control and operation of telegraph and telephone properties back to said joint resolution of July 16, 1918. If the rights which plaintiff claims are clearly embraced within the powers delegated by Congress through such resolution, then he exercises the same under authority of an act of Congress,

and this court cannot undertake to restrain or impede him, while if such threatened violations of state laws are not embraced within the powers which Congress by such resolution delegated to the President, then the Postmaster General, in exercising the same, steps outside of his office and beyond the scope of his official duties, and is amenable to the injunctive process of a court of equity to restrain his unauthorized and illegal acts.

The foregoing conclusion necessarily follows from the fact that the President himself is without Constitutional power or authority to seize and confiscate private property outside of the actual theatre of hostilities, except in so far as he has been vested with delegated authority by the Congressional Resolution referred to. The Constitutional power of the President to conduct war is, in fact, limited in its territorial scope to an immediate area of hostilities and corresponds to the executive powers of a commander-in-chief of a military force. He may seize and utilize enemies' property and impose the stern provisions of military law upon conquered or invaded territory, but he cannot, in a portion of the United States where the hostile forces of the enemy have not penetrated, supersede the ordinary processes of the courts, or suspend the Constitutional rights of citizens to the protection of either persons or property. This court, in the leading case wherein such extra-constitutional war-time powers of the President were asserted, disposed of such claims in the following significant language:

> "The Constitution of the United States is a law for rulers and people, equally, in war and

in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government."

Ex parte Milligan, 71 U. S. 2, 120-121.

THE WIRE RESOLUTION OF CONGRESS EXPRESSLY RESERVED TO THE STATES THEIR LAWFUL POLICE REGULATIONS.

The issues raised, therefore, necessitate primarily an interpretation of the joint resolution of July 16, 1918. We will consider the same in three parts. First, the enacting clause; second, the proviso; and, third, the exception to the proviso. The enacting clause is as follows:

"That the President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense to supervise or to take possession and assume control of any telegraph, telephone, marine cable or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war."

The proviso is as follows:

"Provided further that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states."

To this proviso there is added this exception:

"Except wherein such laws, powers or regulations may affect the transmission of Government communications or the issue of stocks and bonds by such system or systems."

Congress, in our opinion, could have used no stronger, more specific language to indicate its express direction that the rate making power of the states be not disturbed during the period of Federal control. The manifest intention of Congress was, in substance, to authorize the President to assume control of systems of communication only so far as might be necessary to secure the prompt transmission of Government messages, even to the extent of excluding private communication where that should be necessary, and to provide for a more effective censorship to safeguard against communications between the enemies of our country. The resolution, in substance, states that nothing contained therein shall be construed to amend, repeal, impair or affect existing police regulations of the state except wherein such regulations may affect the transmission of Government communications or the issue of stocks and bonds by the corporate owners of the telegraph and telephone properties. This exception to the proviso clearly shows the Congressional intent, and it is our understanding that plaintiff does not claim that the reasonable rates which the State of Illinois has heretofore prescribed for the transmission of telegraph messages do, in any sense, affect the transmission of Government communications or the issue of stocks and bonds. It is claimed, however, that the expression "Police Regulations," as used in this act, does not include the regulation of reasonable rates to be charged and collected by the telegraph companies.

THERE IS NO AUTHORITY FOR THE BURLESON THEORY THAT POLICE POWER AND POLICE REGULATIONS HAVE TWO DISTINCT AND WIDELY DIFFERENT MEANINGS, BUT THE EXPRESSIONS, "POLICE POWER" AND "POLICE REGULATIONS," HOWEVER USED, INCLUDE THE POWER TO REGULATE THE RATES OF PUBLIC UTILITIES.

In urging this interpretation, it is claimed by the Postmaster General that, while Police Powers and Police Regulations are sometimes used interchangeably, these expressions have, in fact, two wholly different and well defined meanings, that is to say, a strict and narrow interpretation relative to the protection of the public health, morals and safety, and a broad and general sense in which the term "Police Power" loses its significance and becomes synonymous with the powers of Government itself.

Is there any judicial authority for such an interpretation? It is true that the scope of the police power is constantly broadening as the state faces the increasing problems and complications of modern industrial life. Many laws are now considered reasonable police regulations which were once considered unconstitutional and beyond the scope of the police power, but from the day of the leading case of *Munn* v. *Illinois*, which went from the courts of this state to the Supreme Court of the United States to become an enduring landmark of the law, it has never been doubted that the police powers of the states embrace regulations designed to promote the public convenience, welfare and general prosperity, as well as the public health, morals and

safety, and specifically that the regulation of intrastate rates to be charged and collected by public utilities is a legitimate exercise of said police power.

We shall not refer again to all of the authorities which have been cited, but desire to point out that the Supreme Court of the United States has specifically repudiated and rejected the *"Burleson Theory,"* which would divide police power into two different classes, and has conclusively held that the police power which is exercised to promote the public convenience and welfare and the general prosperity of the community, must be tested by the same rules and depends upon the same foundations as that police power which purports to relate to the public health, morals and safety.

In *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners,* 200 U. S., at pages 592-593, the court disposes of this argument in the following language:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state, to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well being of the community apart from any question of the public health, the public morals or the public safety. * * * We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. *Lake Shore & Michigan Southern Ry.* v. *Ohio,* 173 U. S. 285, 292; *Gilman* v. *Philadelphia,* 3 Wall. 713, 729; *Pound* v. *Turck,* 95 U. S.

459, 464; *Railroad Co.* v. *Husen*, 95 U. S. 470. And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same."

THE COURTS CONSTANTLY REFER TO THE RATE-MAKING POWER AS POLICE POWER AND TO RATE REGULATIONS AS POLICE REGULATIONS.

Moreover, the courts have repeatedly and consistently referred to the rate-making power as *police power* and to rate regulations as *police regulations*. Many of the old English cases established this principle with respect to the regulation of rates charged by ferries, hackmen and common carriers before the days when telegraph companies and railroads were known, but the first case in which the police power of the state over the rates charged by public utilities was definitely established by the highest court in the United States was *Munn* v. *Illinois*, 94 U. S. 113, decided by the Supreme Court of the United States in 1876. At page 125 the court refers to the police powers as nothing more or less than the powers of the Government inherent in every sovereignty; that is to say, the power to govern men and things, and states:

> "Under these powers the Government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

In one of the recent cases in which this subject has been discussed, the Supreme Court of Oregon expressed the same principle as follows:

> "Power to govern men and things is inherent in government, and when an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good (citing authorities). The right to regulate the rates to be charged by a public utility inheres in the power of government. The regulation of rates for the purpose of promoting the health, comfort, safety and welfare of society is an exercise of the police power, and is therefore an attribute of sovereignty."
>
> *Woodburn* v. *Public Service Commission*, Ann. Cas. 1917E, 996, 998; 82 Ore. 114; 161 Pac. 391.

After reviewing all of the rate regulation cases from *Munn* v. *Illinois* to the present day, it is stated in *Home Telephone Co.* v. *Los Angeles*, 155 Fed. 554, at page 570:

> "From the foregoing excerpts it is manifest that the Supreme Court classifies the power to

regulate rates as governmental and falling within the police powers of the states."

In the *Arkansas Rate Cases*, 187 Fed. 290, at page 297, the court again affirms this doctrine, using this conclusive and significant language:

> "The right of every sovereign state to regulate public service corporations and the rates to be charged by them, subject to the provisions of the Fourteenth Amendment prohibiting deprivation of one's property without due process of law, and other provisions of the national constitution, rests upon the police powers which 'are nothing more or less than the powers of government inherent in every sovereignty.'" (Citing numerous authorities.)

And this court, in the recent case of *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, decided March 24, 1919, reported on page 116 of the United States Supreme Court Advance Opinion, used the following significant language, showing conclusively that rate regulation by a state is an exercise of police power:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state *in the exercise of its police power. Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *German Alliance Ins. Co.* v. *Lewis, Superintendent of Insurance of the State of Kansas*, 233 U. S. 289, 407." (Italics ours.)

Necessarily, Congress in using the expression

"police regulations" in the resolution of July 16, 1918, used the expression in its commonly accepted meaning as defined by the courts in the authorities which have been cited and referred to; and Congress in excepting from the grant of power to the President the existing police regulations of the states, clearly had reference to such police regulations as were then upon the statute books of the several states, including the Public Utilities Commission Law of Illinois adopted by the Legislature in 1913. This act, which the Supreme Court of Illinois has held constitutional and valid, is a comprehensive measure for the regulation of public utilities, and the court in sustaining it specifically refers to it as an exercise of the police power in *City of Chicago* v. *O'Connell*, 278 Ill. 591, at page 603:

> "The regulation of public utilities is one phase of the exercise of the police power of the state."

At page 607 the court further states, reaffirming its former decisions:

> "It is true that a municipality cannot contract away the right to exercise the police power to secure and protect the morals, safety, health, order, comfort or welfare of the public, nor limit or restrain by any agreement, the full exercise of that power. We have accordingly held that a city cannot contract away its right under the police power to fix reasonable rates to be charged by a public utility furnishing water to the city and its inhabitants."

The Supreme Court of Illinois, it clearly appears, makes no distinction between the police power which is exercised to promote the public health, morals and safety, and the police power which is

attributable to the public welfare, order and prosperity, but considers all police power of every kind, character or degree, to be incapable of alienation, and a necessary attribute of sovereignty, which the state can neither surrender nor contract away.

The meaning of police regulations is therefore well settled by the decisions of both the Supreme Court of Illinois and the Supreme Court of the United States, and there remains no debatable field for interpretation or construction. The decisions referred to are binding upon this court and no reason has been urged or suggested which would justify the adoption of a different meaning.

EVERY RULE OF CONSTRUCTION REQUIRES THAT BROAD EFFECT BE GIVEN TO THE LANGUAGE OF THE PROVISO.

If, however, the court should be inclined to give credence to the theory that the police power is sometimes used in two widely different meanings, what possible reason or argument can be advanced for holding that Congress in the resolution of July 16, 1918, used the expression in a strict or narrow sense rather than in the common and ordinary significance as defined by our courts and written into our system of jurisprudence? Obviously, under the fundamental rule of construction, all of the provisions of the resolution, including the enacting clause, the proviso and the exception, must be construed together. Effect is to be given, in so far as possible, to all, and we assume that the court will, in its interpretation, place no limitation upon the broad powers conferred upon the President which could

or would necessarily handicap or embarrass the Government in the conduct of war, if the country were now engaged in war, or delay or hinder the transmission of Government messages. We further assume, however, that the court will take judicial notice of the fact that the actual hostilities between the United States and the German Government were terminated by the armistice of November 11, 1918, and that the acts which the Postmaster General now seeks to do, in violation of state laws and lawful police regulations of the state, do not affect in any degree whatsoever the transmission of Government messages and have no possible relation to the conduct of the war, but will at most place upon the users of long distance telephone service, already burdened by the high cost of all necessities of life and business, a new and additional burden which has not been justified by any hearing before the proper state officials entrusted with the responsibility of determining just and reasonable rates to be charged by public utilities, which, as plaintiff frankly admits, is not based upon any survey or valuation of the property which is devoted to the public use and which, as far as we are advised, are not based upon the cost of furnishing such service or upon the necessities of the Government for additional revenues and funds, but solely upon the order and direction of the Postmaster General.

THE POWER TO OPERATE AND CONTROL DOES NOT OF NECESSITY INCLUDE THE POWER TO FIX RATES.

It has been furthermore suggested by the Postmaster General that Congress could not possibly have intended to authorize the President to control and operate the telegraph systems of the United States and to pay to the owners just compensation therefor without also conferring upon the President the rate-making power, in order that he might be authorized, from time to time, as necessity arose, to prescribe new rates and tariffs to the end that the properties might earn sufficient revenue to pay just rental to their owners. This argument loses sight of the real purpose for which Congress seized the telegraph and telephone property. There is no more authority or reason for holding that when Congress took possession of telegraph companies for war making purposes they must be made to derive sufficient revenues from the public to pay the compensation therefor than there would be for applying the same principle to the seizure or control of an automobile factory, a ship-yard or any other established business. In each case, the Government takes the property in order to devote its product and use in so far as necessary to war purposes, and if there is a deficit occasioned thereby, the Government, out of the public revenue, and not the ordinary users of the property, should foot the bill.

Furthermore, it is not conceivable that, if the established intrastate rates for telegraph service should prove insufficient or inadequate to meet the necessary expenses of operating the companies dur-

ing war conditions, the state authorities having charge of the regulation of such rates would, upon application, deny to the Postmaster General the authority to permit necessary increases. The Illinois Public Utilities Commission Law and the similar laws of other states provide that the rates to be charged by public utilities shall be just, reasonable and adequate. They provide a proceeding by which public utilities may apply for necessary increases, and it cannot be doubted that if the Postmaster General, instead of acting in defiance of state laws and state police regulations, had applied to the state authorities for permission to increase telegraph rates, and submitted the necessary information to show that such increase was justified and necessary, the increased rates would have been authorized without litigation and without delay.

That such procedure would not have been impracticable nor unduly burdensome, is shown through the one practical application which it has had. We refer to the increase in express rates, effective July 1, 1918, which was ordered on intrastate traffic by the Interstate Commerce Commission. Application for a like increase was made by telegraph to the various state commissions and the increase was promptly granted, as requested, by all except five states, and these states have since granted such increases subject to certain modifications necessary to meet local conditions.

The argument that the various states might refuse the requested increases and thus create confusion and discrimination loses sight of the fact that

the standard of rates in various states, and also in interstate commerce, is the same, that is to say, just and reasonable rates. Such being the fact, it cannot be assumed that the State Commission will fail to perform their duty and authorize any just and reasonable rates which the Postmaster General may desire to make effective.

Moreover, the rates to be charged for public utility service in different communities, among varying conditions, and prices for material and labor, are peculiarly a matter of local concern, which should be left to the regulation of local authority. Even if the Burleson construction of the proviso be accepted, Congress still left it to the local authorities to determine in what way the telegraph properties should be operated under regulations necessary to protect the public health, the public morals and the public safety. In the different states, there are widely divergent laws relative to the hours which employes may labor, the speed at which telegraph messengers may travel in delivering messages, and the protection which telegraph wires must receive in the way of insulation and covering, and in all these respects, it is conceded that Congress left the Government operated telegraph lines subject to such reasonable regulations as the various states might impose. No additional reason, not equally applicable to such police regulations relative to the public health, morals and safety, have been suggested why Congress did not also intend to continue in full force and effect the police regulations of the state which have to do with general prosperity and the public welfare. There is no Federal police

power, in the general sense in which the term "Police Power" is used, and Congress, in using the words "Police Regulations," therefore, of necessity, referred to such varying police regulations as the several states might see fit to impose, and which are peculiarly a matter of local concern, and therefore properly left to the enforcement of state authorities. If such varying laws of different states are a cause of embarrassment to the Postmaster General, the fault is attributable to Congress and not to him, and cannot justify a total disregard of state laws and the limitations of the act under which the government controls and operates the wires.

IN SO FAR AS THE WIRE RESOLUTION SUSPENDS OR NULLIFIES RESERVED POWERS OF STATES, IT MUST BE STRICTLY CONSTRUED.

Furthermore, it is another accepted principle, that under our dual system of government, Federal and State, the powers not delegated, expressly, or by necessary implication, to the United States, are reserved by the states. The proviso was not intended to confer upon the states the right to exercise police power, because such power is inherent in them, and not in Congress, but it was intended to eliminate any possible construction which would tend to impair or affect the lawful police regulations of the states, state powers which have never been surrendered to the Federal Government, but remain in the states as at the time of the adoption of the Constitution.

South Carolina v. *United States,* 199 U. S. 437.

Keller v. *United States,* 213 U. S. 138.

It necessarily follows, therefore, that when Congress enacts a measure in derogation of states' rights, all questions regarding the interpretation of such measure must be resolved in favor of the states and against the National Government, and the state authority will be superseded, if at all, only to the extent to which Congress has clearly and exclusively occupied the field by a Federal measure enacted pursuant to its Constitutional power. This rule of construction requires that the Wire Resolution be interpreted in such a manner as to reserve to the states all lawful rights which do not interfere with the war-making power of Congress, that is to say, the transmission of Government messages for war purposes, and clearly preserves to the states all of those powers and rights which have commonly been designated *police regulations.*

For the reasons stated, it is our contention that the proviso should not be narrowly construed; that Congress in fact never intended it to be narrowly construed. By a strange coincidence, just as Congress by the insertion of the proviso clearly manifested its intention not to include in the delegation of power to the President any authority to set aside and nullify existing state police regulations, so Congress, by the addition of the exception to the proviso, clearly showed that it used the expression "*police regulations*" in the broadest possible sense, and not in any narrow or limited meaning.

THE EXCEPTION TO THE PROVISO ELIMINATING THE REGULATION OF SECURITY ISSUES FROM THE POWERS RESERVED TO THE STATES CLEARLY SHOWS THAT CONGRESS USED THE WORDS "POLICE REGULATIONS" IN THEIR MOST COMPREHENSIVE SIGNIFICANCE.

As will appear from the authorities cited, the expression "*police regulations*" has been construed by the courts to include all things which the state necessarily does to promote the public health, morals, safety, welfare and convenience, including the power to regulate public utilities, fix their reasonable rates and charges, and establish their reasonable standards of service, and the Illinois Public Utilities Commission Law is a general police regulation designed to promulgate a comprehensive system for the regulation of public utilities.

Among the powers which the Public Utilities Commission of Illinois is by said statute authorized to exercise is the regulation of the issue of stocks, bonds and other securities by public utilities doing business in this state. Similar regulations are found in the public utilities laws of various other states. The Illinois Supreme Court has not had occasion to pass upon the constitutionality of such regulations, but in other states it has been held that the regulation of the issues of securities by public utilities is not primarily police power, but can be exercised by the state only by virtue of the power of the sovereign, the creator, over the corporations to which it gives life and existence. The Congress, by the exception engrafted on the proviso to the Wire Resolution, clearly showed, in our opinion, that in using the

expression *"police regulations"* it referred to police power of every kind, character and degree, including measures relative to the public welfare and prosperity, as well as measures designed to promote the public health, morals and safety, and then because it was thought possible that this broad police power might even be construed to include the regulation of security issues, Congress added the exception to the proviso, in order that this specific power might not be reserved to the states and that all doubt as to the congressional intent might be removed.

If, as plaintiff contends, Congress had used the expression *"police regulations"* in any narrow significance, having to do merely with local and municipal ordinances, such as the police commonly enforce, in respect to the stringing of telegraph wires and their proper insulation and protection, then it would clearly have been unnecessary for Congress to add the express language which removed from the operation of the proviso the regulation of the issue of securities. The language used makes clear the intention of Congress, and it is our opinion that, giving effect to the provisions of the resolution as a whole, Congress delegated to the President the vast power to take physical possession of the telephone and telegraph systems and property, wherever situated in the United States, and to control and operate the same, and to do all other things which might be necessary to assist in bringing to a successful consummation the war with the German government, but that Congress expressly ex-

cepted from the power so granted, and in effect ordered the President not to interfere with the powers of the states in reference to taxation and such lawful police regulations as the control of intrastate rates, and then, in order that the President, in spite of this proviso, might not be embarrassed in refunding the obligations of said companies because of conflicting state laws, there was added the additional exception in reference to the regulation of security issues.

THE RAISING OF TELEGRAPH RATES IS NOT A LEGITIMATE WAR MEASURE, AND THE STATE OF ILLINOIS IS NOT ESTOPPED TO ASSERT ITS CONSTITUTIONAL RIGHTS.

Considering these provisions of the resolution as a whole, we find no apparent inconsistency, and we believe we place upon the act and upon the intention of Congress, no strained construction in holding that the State of Illinois retains all of its police power to make and enforce lawful police regulations in respect to the operation of the telegraph lines of these Defendants. The Postmaster General operated said property from the 31st day of July, 1918, throughout the remaining period of the war and up to the 1st of April, 1919, nearly five months after actual hostilities had ceased, without discovering any necessity for overriding state laws or making changes or increases in the rates for intrastate telegraph service, which the state, by its properly constituted authorities, had established and approved. No reason has been suggested or shown why the Postmaster General cannot and

should not now be compelled to continue to operate said property in full compliance with the laws of this state. During the actual continuance of a state of hostilities with Germany the various states, as a matter of patriotism, acquiesced in the promulgation of many rules and regulations by the Director General of Railroads in respect to the operation of the railroads of this country which seemed to them unjustified and unauthorized by law. The State of Illinois, for this reason, acquiesced in the establishment of a rate of three cents per mile for intrastate travel upon the railroads of this state, in violation of the existing Illinois statute and without any authority from its Public Utilities Commission. With the ending of the war, however, all reason for the surrender of any right of the state to exercise its control over intrastate rates has been terminated, and we, therefore, respectfully insist that under the Constitution and laws of the United States, the State of Illinois, through its Public Utilities Commission, has the sole right and authority to establish and determine the rates to be charged by the Postmaster General for the transmission of telegraph messages between points lying wholly within the State of Illinois.

PLAINTIFF IS NOT IMMUNE FROM SUIT BECAUSE HE CLAIMED TO ACT AS AGENT OF THE UNITED STATES.

These being the rights of the State of Illinois, has any valid reason been urged why these rights should not be vindicated and upheld by the injunction of this honorable court? Plaintiff claims he is

immune from the process of this court because he acts solely as the agent of the United States Government, and because the real party in interest is the United States, which cannot be sued without its consent.

To this contention we answer that while the courts will not interpose their judgment against the decision of a United States officer in respect to any matter within the scope of his authority and wherein he is given discretion to act, a court of equity will grant relief against an officer, *even against the Postmaster General, himself,* in a case where he has attempted to go outside of his authority and exercise jurisdiction not conferred upon him by statute.

The United States Supreme Court has in fact expressly held that the Postmaster General may be enjoined from refusing the use of the mails to a citizen in violation of federal law. The opinion discusses all of the questions which plaintiff has raised in this proceeding, and disposes of the same in the following language:

> "Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the

statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

That the conduct of the post office is a part of the administrative department of the Government is entirely true, but that does ont necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 107, 108.

THE PROCESS OF THE COURT IS NOT STAYED BECAUSE THE RELIEF SOUGHT WOULD DEPRIVE PLAINTIFF OF PROPERTY CLAIMED BY THE UNITED STATES.

Counsel for plaintiff will doubtless suggest that a court of equity will not interfere in this proceeding because the effect of the injunction would be to take from the United States property which it claims as its own. In advancing this argument, counsel wholly misconceives the nature of this proceeding, for we seek not to enjoin the United States from using its own property, but to prevent the telegraph

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Counsel for plaintiff will doubtless suggest that a court of equity will not interfere in this proceeding because the effect of the injunction would be to take from the United States property which it claims as its own. In advancing this argument, counsel wholly misconceives the nature of this proceeding, for we seek not to enjoin the United States from using its own property, but to prevent the telegraph

companies and their officers and employes from illegally charging, collecting and receiving money which belongs to the citizens of Illinois and not to the United States Government, and which, in our view of this case, Congress never intended that the telegraph companies should receive.

Even in cases where the officers and representatives of the United States are illegally in possession of land belonging to a citizen, and defend their possession as the possession of the United States pursuant to the order of the President, it has been held that the courts are not without authority to grant appropriate relief. This precise question arose in the case of *United States* v. *Lee,* 106 U. S. 196, a proceeding originally commenced by Lee in the Virginia state courts to recover possession of a portion of Arlington Cemetery, which was occupied by certain officers of the United States army. Defendants claimed authority to hold possession of said property as the agents of the federal government, and removed the proceedings to the United States courts, where a jury found that the land belonged to the plaintiff and that the title of the government was invalid. Subsequently the attorney general intervened on behalf of the United States, and took the case to the Supreme Court upon writ of error. We quote from the opinion at pages 215, 216, 219, 220 and 221:

> "This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the at-

tention of the court, has been overruled and denied in every case where it has been necessary to decide it. * * *

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation. * * *

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer

had no more authority to make than the humblest private citizen." (Italics ours.)

The foregoing decision has been repeatedly cited and followed in subsequent opinions of the Supreme Court, and it stands unimpeached, as conclusive authority for the proposition that *in this country no man is so far above the law that when his illegal actions are attacked in the courts he can assert absolute exemption from suit because he claims to act as the agent of the United States or the representative of the President.*

THIS IS NOT A SUIT AGAINST THE UNITED STATES.

Moreover, this is not a suit against the United States nor a proceeding *in rem* against property belonging to the United States. The controversy is not of a political nature nor does it extend to the Constitutional rights or authority of the President in so far as the President is concerned herein. It is by reason of the power delegated to him by Congress, and not by reason of the Constitutional powers vested in him by the Constitution. The question as to the extent of the power so delegated by Congress is not affected by the political office or standing of the persons to whom the power was delegated. As was said by Mr. Chief Justice Marshall, in *Marbury* v. *Madison,* 5 U. S. 137, 166-171:

"It is not by the office of the person to whom the writ is directed, but the nature of thing to be done that the propriety of judicial interference is to be determined."

Moreover, the President of the United States, un-

der authority vested in him by the Congressional Resolution, can only delegate to his agents and employes such authority as he himself is authorized to exercise. Referring to the powers of the President, under the act authorizing Federal control of the railroads, the United States District Court for the Eastern District of South Carolina, in an opinion handed down November 30, 1918, stated:

> "Under this statute, the president could authorize the Secretary of War only to take possession of such property as he himself is authorized to take possession of under the statute. The extent of his power, and the definition of what property he was authorized to take possession of under the statute, would be necessarily a judicial question. All acts done, and all property taken possession of, within the adjudicated extent of the powers allowed, might be a ministerial question, but as to the extent of those powers, and whether the powers were given, must always, under the Constitution of the United States, remain a judicial question, and one to be decided by the courts of the land."
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> *United States Railroad Administration* v. *Burch,* 254 Fed. 140, at 142.

This action is not brought to interfere with the property of the telegraph companies or with the property of the United States Government. It is not brought to interfere with, or control the exercise of the judgment or discretion of any officer of the executive department of the Government as to those duties which the law requires him to perform and as to the matters which come within his jurisdiction. It is to enjoin such officer or agent from acting unlawfully, and as to matters concerning

which he is wholly without jurisdiction or authority under the Act of Congress, pursuant to which he purports to act.

In this proceeding, the plaintiff himself first invoked the jurisdiction and assistance of a court of equity to protect him in the exercise of his asserted power, and he cannot now he heard to state that the court is without jurisdiction over him to enjoin him from exceeding his authority, or to construe the act under which he operates and controls the telegraph companies.

THE DISTRICT COURT OF THE UNITED STATES HAD FULL AND COMPLETE JURISDICTION OVER BOTH THE SUBJECT MATTER OF THIS PROCEEDING AND THE PARTIES THERETO, AND HAD FULL AUTHORITY TO GRANT THE RELIEF PRAYED FOR BY DEFENDANTS.

There remains but one question for consideration. Did the people of the State of Illinois appeal to the proper tribunal for relief? In similar proceedings instituted by state authorities against telephone companies in the Federal Courts of Indiana, Florida, Nebraska and other states, the Postmaster General has contended that the Federal Courts were wholly without jurisdiction over the subject matter, because the state's right of action was bottomed upon the violation of state laws. This defense is not available to the Postmaster General in this proceeding because he himself submitted to the jurisdiction of the United States District Court and thereby opened the way for the defendants to seek equitable relief against him. In other similar proceedings in state courts, the Postmaster General

has furthermore contended that he is immune from suit, and that no matter to what extent he may have exceeded his delegated powers and infringed the reserved rights of states, there is no judicial tribunal authorized to enjoin him, and that he is responsible only to Congress in an impeachment proceeding.

With reference to these asserted claims of immunity from suit, the defendants herein take the position that the Constitution of the United States does not permit a great wrong and violation of state rights without affording a remedy. It cannot be that the millions of users of telegraph service in Illinois can be illegally compelled to pay thousands of dollars additional each day for telegraph charges, and that the law and courts are powerless to grant relief. It cannot be that there is no tribunal which can protect the State of Illinois in the exercise of its police power in these matters which concern so vitally the general welfare of all users of telegraph service in this state. Manifestly, there must be some tribunal which is authorized to grant relief to these defendants against the Postmaster General, and we respectfully submit that the United States District Court for the Northern District of Illinois had full and complete authority over the parties hereto and the subject matter involved, and full jurisdiction to enter the decree order permanently enjoining the plaintiff from charging unauthorized rates for intrastate telegraph service between points lying wholly within Illinois. In similar proceedings in the state courts of Indiana, Ohio, Minnesota, Michigan, Illinois and South Dakota, injunctions have been granted to the people, restraining the telegraph and

telephone companies and the agents and representatives of the Postmaster General, from the collection of unauthorized and illegal tolls and charges. The opinion of the Supreme Court of South Dakota, in the proceeding entitled, *State ex rel Payne* v. *Dakota Central Telephone Company,* 171 N. W. Rep. Advance Sheets, page 277, is now before this court for review, and furnishes a well considered statement of the position taken by the defendants in this proceeding. Upon the authority of this opinion, as well as upon the authority of the cases cited herein, we respectfully pray that the decree of the District Court for the Northern District of Illinois may be approved and affirmed by this honorable court, and that the plaintiff may be permanently enjoined and restrained from charging, collecting, demanding or receiving, for the transmission of messages by telegraph between points lying wholly with the State of Illinois, any rates other and different than such rates as may be approved by the Public Utilities Commission of Illinois, in compliance with the laws of said state.

Respectfully submitted,

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